(2) No. 94-222

Supreme Court, U.S.
FILED
SEP 1 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

INTERMEDICS, INC.,

Petitioner,

vs.

VENTRITEX CO., INC., MICHAEL SWEENEY AND BENJAMIN PLESS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KEKER & VAN NEST
*JOHN W. KEKER
JEFFREY R. CHANIN
DARALYN J. DURIE
710 Sansome Street
San Francisco, CA 94111
(415) 391-5400

BROBECK, PHLEGER & HARRISON
HENRY C. BUNSOW
DENIS R. SALMON
M. KIP WELCH
Two Embarcadero Place
2200 Geng Road
Palo Alto, CA 94303
(415) 424-0160

Attorneys for Respondents Ventritex, Inc., Michael Sweeney and Benjamin Pless

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

6 pp

INTRODUCTION

The petition for certiorari presents three questions. The first two concern whether the Federal Circuit erred in affirming the district court's grant of summary judgment because the Federal Circuit did not issue a written opinion. The third presents an issue that was never raised below respecting the Federal Circuit's power to transfer the case.

This case is not worthy of the Supreme Court's attention. As to the first and second questions presented, there is no benefit to a rule requiring the Federal Circuit, or any other court, to write an opinion in every case. Where the lower court's opinion disposes of all the issues presented, approval without opinion is efficacious and appropriate. As to the third question, the petitioner elected to appeal the lower court's decision to the Federal Circuit after having filed an earlier appeal in the same case with the same circuit. Petitioner never once suggested, before the Federal Circuit's decision, that the appeal should be transferred to the Ninth Circuit. Thus, there is no reason to believe that the Federal Circuit ever passed on the scope of its jurisdiction or its power to transfer the case. That question should properly have been presented to the Federal Circuit in the first instance, prior to seeking intervention by the Supreme Court.

FACTUAL BACKGROUND

This petition for certiorari is part of a longstanding and rancorous dispute between the parties, who are competitors in a concentrated market. In 1985, Intermedics

sued Ventritex, then a start-up company, and two of its employees, alleging trade secret misappropriation, and a host of other state law claims. Ventritex filed various counterclaims. Following extensive investigation and informal discovery, including an audit of Ventritex's technology by an expert selected by Intermedics, both parties dismissed all claims with prejudice.

In 1990, Intermedics refiled many of the same claims against Ventritex, with the addition of claims for patent infringement, notwithstanding the prior settlement agreement that was intended to secure permanent peace. Ventritex alleged that the litigation was brought in bad faith. The district court dismissed most, but not all, of Intermedics' patent infringement claims as not ripe. Intermedics appealed that dismissal to the Federal Circuit, and the dismissal was affirmed. The parties then proceeded to trial on the remaining non-patent claims.

Intermedics stipulated to a phased trial procedure whereby misappropriation of six of Intermedics' thirty-seven alleged trade secrets would be tried to the jury. The district court indicated at that time that the jury's factual findings might control the disposition of the case with respect to the remaining thirty-one alleged trade secrets. The jury found for Ventritex on all counts. The jury also found that Intermedics had pursued its misappropriation claims in bad faith.

Based upon the jury's factual findings, the district court entered judgment for Ventritex on the six trade secret claims tried, together with a partial judgment for Ventritex as to all 37 alleged trade secrets on statute of limitations grounds. In support of its decision, the district

court issued a lengthy published opinion. The patent claims that were not dismissed are still pending, as is the bad faith issue on which Intermedics was granted a new trial.

Intermedics appealed the partial judgment to the Federal Circuit, as was proper under governing law, because the complaint then included and continues to include patent claims. Intermedics did not question the Federal Circuit's jurisdiction, which Intermedics had itself invoked, nor did it request the Federal Circuit to transfer the case to the Ninth Circuit at any time before or after the Federal Circuit's decision.

The Federal Circuit affirmed without opinion. Intermedics did not ask the Federal Circuit to issue an opinion, nor did it request rehearing by the panel, or rehearing en banc. Instead, Intermedics petitioned for certiorari. The petition should be denied.

ARGUMENT

I. THE FEDERAL CIRCUIT'S AFFIRMANCE WITHOUT A WRITTEN OPINION DOES NOT PRESENT AN ISSUE WORTHY OF SUPREME COURT REVIEW.

The Federal Circuit's decision to affirm without opinion is hardly untoward, especially in light of the district court's lengthy published opinion. The complex factual and procedural underpinnings of the case, turning in part upon the application of state law statute of limitations rules to the facts of a technology audit and the information revealed therein, sharply limit the application, and

thus the precedential value, of any opinion. Moreover, because the Federal Circuit decided the case under state law, the federal court's conclusions would have very limited relevance in the future.

Intermedics' contention that an opinion from the Federal Circuit was necessary to guide the conduct of the parties and the district court is equally meritless. The district court's point-by-point analysis is more than adequate to the task. The Federal Circuit's reasoning is implicit in its order: the district court was correct in its analysis and conclusions. That the Federal Circuit may have inquired as to the basis of the district court's opinion at oral argument is irrelevant; the district court's opinion became the law of the case, and will guide the course of the ongoing litigation. The Federal Circuit could have written an opinion had it thought the district court's analysis insufficient; its decision that such an opinion was not necessary speaks for itself.

Finally, Intermedics can invoke no specific right to a written opinion, and the decision whether a written opinion is necessary should be left to the discretion of the court of appeals, as with other matters pertaining to the court's docket. *Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673 (Tex. App.), *cert. denied*, ___ U.S. ___ (1994) (decision whether to grant oral argument purely within discretion of trial court).

II. THE SUPREME COURT SHOULD NOT RULE ON THE SCOPE OF THE FEDERAL CIRCUIT'S POWER TO TRANSFER BEFORE THE FEDERAL CIRCUIT IS GIVEN AN OPPORTUNITY TO DO SO.

Intermedics' argument that the Supreme Court should rule in the first instance on a transfer issue never

before raised by Intermedics fares no better. Intermedics' transfer position is, as Intermedics itself acknowledges, without precedent. *See generally Abbott Labs v. Brennan*, 952 F.2d 1346 (Fed. Cir. 1991); *Christianson v. Colt Industries*, 486 U.S. 800, 814 (1988). Intermedics' unhappiness with the result in this case cannot alter the fact that the Federal Circuit's exercise of jurisdiction was clearly proper.

Moreover, the filing of a petition for Supreme Court review of an issue never raised below is perplexing. The Federal Circuit should have been presented with an opportunity to rule on the question whether it may transfer a case in a situation such as this; only then might Supreme Court intervention be necessary or appropriate. Instead, Intermedics has challenged the Federal Circuit's failure to do that which was never requested.

CONCLUSION

For the reasons set forth above, Ventritex respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

*John W. Keker
Jeffrey R. Chanin
Daralyn J. Durie
Attorneys for Respondents Ventritex, Inc., Benjamin Pless and Michael Sweeney

*Counsel of Record